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No. 73

No. 73

In the Supreme Court of the United States

OCTOBER TERM, 1957

FEDERAL MARITIME BOARD, *Petitioner*

v.

ISBRANDTSEN COMPANY, INC., UNITED STATES OF AMERICA, AND SECRETARY OF AGRICULTURE

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER FEDERAL MARITIME BOARD

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (R. 237-251) is reported at 239 F. 2d 933 (D.C. Cir. 1956).

JURISDICTION

The judgment of the Court of Appeals was entered November 9, 1956 (R. 250). The Federal Maritime Board petitioned for a writ of certiorari on January 7, 1957; the writ was granted March 25, 1957, 351

U.S. 994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) (62 Stat. 928), as prescribed by 5 U.S.C. 1040 (64 Stat. 1132, Section 10).

QUESTION PRESENTED

Section 15 of the Shipping Act, 1916, authorizes the Federal Maritime Board[1] to approve agreements between ocean carriers "fixing or regulating transportation rates or fares; giving or receiving special rates" or "controlling, regulating, preventing, or destroying competition". Section 14, Third, forbids the carrier to "Retaliate against any shipper by refusing * * * space accommodations * * * or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier * * * or for any other reason." The question is whether the Board, upon a finding that it is not "unjustly discriminatory," may under Section 15 approve a so-called "dual rate system" by which lower rates are charged shippers who agree to use only lines which are members of the steamship conference, or whether the dual rate system is illegal *per se* under Section 14, Third.

STATUTE INVOLVED

The pertinent provisions of the Shipping Act, 1916, as amended, 39 Stat. 728, *et seq.*, 46 U.S.C. 801 *et seq.*, are set forth in Appendix A.

[1] "Board", as used in this brief, refers to the Federal Maritime Board and its predecessor agencies. The United States Shipping Board was created by the Shipping Act, 1916 (46 U.S.C. 801, 39 Stat. 728), and was succeeded by the Secretary of Commerce by Executive Order 6166, June 10, 1933, by the United States Maritime Commission by the Merchant Marine Act, 1936, Section 204(a) (46 U.S.C. 1114, 49 Stat. 1987) and by the Federal Maritime Board by Reorganization Plan No. 21 of 1950, Section 104 (15 F.R. 3178).

STATEMENT OF THE CASE

The Japan-Atlantic and Gulf Freight Conference (the "Conference") is a voluntary association of common carriers by water serving the inbound trade from Japan to ports on the United States Atlantic and Gulf coasts. The Conference exists by virtue of its organic agreement, F.M.B. No. 3103, approved by the Board on June 25, 1934 (R. 24), under Section 15, Shipping Act, 1916 (herein referred to as "the Act").

Section 15 (46 U.S.C. 814; see Appendix A, pages 76-79, *infra*) authorizes the Board to approve certain types of agreements among common carriers by water or among other persons subject to the Act, including, among others, agreements fixing rates or giving special rates, or controlling or destroying competition. Agreements subject to Section 15 are exempt from the anti-trust laws. The section authorizes the Board to disapprove any agreement "* * * whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of [the Shipping Act, 1916] * * *" and directs that it "shall approve all other agreements * * *."

On December 24, 1952, the Conference filed a statement with the Board announcing the intention to initiate a system of rates of the type commonly known in ocean transportation as a "dual rate system." The Conference's proposal resulted from conditions in the trade, discussed below, which subsequently were found by the Board to justify the use of the system.

Under the proposed dual rate system, as in the systems employed by many conferences in other foreign trades, contract rates on virtually all commodities would be given to those shippers promising to ship exclusively via Conference vessels, and all other shippers would be charged a tariff rate 9½ percent higher than the contract rate. The shipper's promise is embodied in a "Shipper's Rate Agreement" (R. 203-206) which provides for liquidated damages to be assessed against a contracting shipper who has violated the contract by shipping via a non-Conference line; the damages are 50 percent of the contract freight rate. Thus, the dual rate system contemplates two levels of rates, separated by a fixed differential, the lower of which is made available to shippers who agree to patronize the Conference members exclusively.

After receiving protests against the Conference proposal by Isbrandtsen Company, Inc. (Isbrandtsen) on January 12 and January 19, 1953 (R. 207-209), and by the Department of Justice (R. 209-211), the Board, on January 21, 1953, ordered a hearing on the protests.[2] The Department of Agriculture intervened in opposition to the Conference proposal.

A complete hearing was held before a hearing examiner of the Board, who upheld the legality of the proposed dual rate system (R. 22). Exceptions to the Examiner's recommended decision and replies

[2] The same order also permitted the Conference to put its proposed dual rate system into effect pending the hearing. This portion of the order was set aside by the United States Court of Appeals, District of Columbia Circuit, in *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (1954), which held that the proposed dual rate system was an agreement within the meaning of Section 15, and hence could not be put into effect without prior formal approval by the Board.

thereto were filed, and oral argument was heard by the Board. The Board issued its Report on December 14, 1955 (R. 49-69), and on December 21, 1955, and January 11, 1956, the Board issued orders approving the Conference agreement adopting the dual rate system (R. 73-74).[3]

By stipulation of the parties,[4] the findings of fact made by the Board in its Report of December 14, 1955, are to be taken as true for purposes of judicial review (R. 232, 235). These findings, leading to the Board's approval of the Conference proposal, may be summarized as follows:

The Conference is a voluntary association of seventeen steamship lines. The present Conference membership includes five United States-flag lines, eight Japanese-flag lines, and four lines of other foreign nationalities (R. 23).

Since World War II, Isbrandtsen has furnished the only non-conference berth (or common carrier) service in the trade. From 1947 to early 1949, Isbrandtsen operated westbound from Japan to United States Atlantic ports via the Suez Canal. Since early 1949, it has operated an approximately fortnightly service from Japan to United States Atlantic ports via the Panama Canal as part of its eastbound, round-the-world service (R. 25).

Conference membership is open to any common carrier regularly operating or intending so to operate in

[3] The January 11 order clarified the December 21 order.

[4] By Prehearing Stipulation in the Court below dated February 20, 1956, as amended by the Court's order dated March 16, 1956, the parties agreed that Board approval of the dual rate system in "the particular trade herein involved," should be reviewed "on the basis of the facts existing in the administrative record as found by the Board . . . ." (R. 230-235).

the trade. Isbrandtsen has remained outside the Conference as a matter of choice, although invited to join (R. 25).

The trade is overtonnaged; that is, there is a considerable excess of vessel space over cargo offerings. Total sailings have risen sharply since World War II: from 109 in 1949 to a projected 300 in 1953 (R. 27). American-flag lines,[5] carried 53 percent of the total berth cargo in the trade in 1950, 46 percent in 1951, 34 percent in 1952, and 21 percent in the first six months of 1953. The Japanese lines, which began to re-enter the trade in 1951, have carried an increasing share of the traffic; by the first half of 1953 their participation had risen to 66 percent of the total (R. 27-28). The vessels both of the members of the Conference and, to a lesser extent, of Isbrandtsen, had substantial free space after completion of loading in Japan (R. 28).

Between 1947 and March 12, 1953, Isbrandtsen maintained its rates on most commodities, on the average, at a level approximately 10 percent below the corresponding Conference tariff rates. Conference increases in rates were followed promptly by Isbrandtsen increases, and when, in November 1952, the Conference announced a 10 percent reduction in rates, Isbrandtsen announced that its new rates would be 10 percent less than the effective Conference rates (R. 29). Because Isbrandtsen uniformly followed Conference rate increases with corresponding increases in its own rates, its participation in the trade, prior to the outbreak

[5] Lykes Bros. SS Co. serves United States Gulf ports only; American President Lines operates from Japan to Atlantic ports of the United States via the Suez Canal as a part of its westbound, round-the-world service. Neither line's carryings are materially important in point of volume in the Conference trade, and they are not included in the data above.

of the rate war, had little practical effect on the rate level (R. 68).

The Conference is at a competitive disadvantage as compared with individual lines in making rapid rate changes, because changes in Conference rates may only be made by an affirmative vote of two-thirds of the voting members (R. 30).

In 1950, 1951 and 1952, respectively, Isbrandtsen made only 13 percent, 11 percent, and 10 percent of the sailings, yet carried 34 percent, 30 percent and 26 percent of all the cargo moving in the trade (R. 27). Isbrandtsen in 1952 carried more cargo with 24 sailings than did the non-Japanese conference lines with 132 sailings (R. 61). There were indications that Isbrandtsen had planned to increase its service to three or four sailings per month; this led the conference to apprehend a further increase in Isbrandtsen's participation, most probably at the expense of the non-Japanese Conference lines which did not enjoy as an offsetting factor the nationalistic preference of Japanese shippers (R. 61).

At a special meeting on March 12, 1953, the Conference voted to open rates[6] on ten of the major commodities moving in the trade in order to meet Isbrandtsen's competition. Subsequently, the Conference voted to open rates on most of the commodities that move in substantial volume in the trade (R. 30). After March 12, 1953, the level of rates dropped, first, to about 80 percent, and later to about 30 to 40 percent of the pre-March 12 level. On a fairly large number of items, some lines have charged rates as low as $6.00-6.50 per

[6] By opening rates, Conference members discontinue the collective fixing of rates. Each member becomes free to fix its own rates independently of the other members.

ton, while the mere cost of loading and discharging the cargo in this trade is approximately $8.50 per ton. Isbrandtsen tried at first to keep on a competitive basis in the rate war until mid-May 1953, when it set minimum rates. Since the rate war, Isbrandtsen has carried little cargo in the trade (R. 31).

Many Japanese shippers have requested the Conference to close rates and to end the rate war. The instability resulting from the rate war has adversely affected the smooth flow of commerce between Japan and the United States; has raised a threat that customs duties on Japanese products in the United States might be increased; has affected the value of inventories of Japanese goods in the United States; and has caused requests for postponement of shipment by f.o.b.[7] buyers in the United States, since such buyers assume the risk of fluctuating freight rates. Resale prices of Japanese goods are often fixed by the importers as much as six months in advance of their arrival in the United States (R. 32).

Each of the shippers testifying before the Board in this proceeding gave his general support to the use of dual rates as proposed by the Conference (R. 33).

In the light of these facts, the Board considered inauguration of a dual rate system to be necessary to enable the Conference to meet its non-conference competition (R. 60). It found that the only other way the conference lines could meet Isbrandtsen's competition was by rate-cutting, which would eliminate the other U.S.-flag lines along with Isbrandtsen; this the Board considered contradictory of the purpose of the Act (R. 64). The Board found that institution of the

[7] Most commodities in this trade are sold on a f.o.b. basis (R. 32).

dual rate system would result in greater stability of rates and service, facilitate trading on the basis of advance commitments, and decease the threat of rate wars (R. 61-62). The Board further found that the 9½ percent spread was reasonable and would probably allow Isbrandtsen to retain 10 percent or more of the cargo moving in the trade which would be at least an equitable share (R. 62). The Board ultimately found that the proposed system was not unjustly discriminatory or unfair or likely to operate to the detriment of the foreign commerce of the United States, or in violation of the Shipping Act (R. 69).

Isbrandtsen petitioned the Court below to review the Board's orders and applied for an interlocutory injunction pending such review. On February 10, 1956, an interlocutory injunction was granted. On November 9, 1956, the Court decided on the merits that the Board may not approve the dual rate system in any case because the system is necessarily retaliatory and discriminatory within the meaning of Section 14, Third. That decision is here under review.

SUMMARY OF ARGUMENT

The court below, 40 years after enactment of the Shipping Act, 1916, has given it an unprecedented interpretation. It has accepted the Board's finding that the dual rate system here involved is not "unjustly discriminatory" but has held it illegal *per se* because it found an absolute prohibition in Section 14, Third. The decision is without support in the statutory language and produces a result contrary to that which the Congress plainly intended.

I

The literal reading of Section 14, Third, would make it unlawful for any common carrier by water to "resort to other discriminating * * * methods * * * for any other reason." This reading cannot be accepted, as it would convert most of the Act into surplusage or contradiction. The court below did not accept the literal reading but assumed that "resort to * * * discriminating * * * methods" was modified by two other clauses of the section: that condemning retaliation, and that describing the motive as because of patronage of another carrier. This reduces the areas of contradiction, but still cannot be accepted, for it makes the whole of Section 14, First, describing and forbidding deferred rebates into meaningless surplusage.

The proper reading of Section 14, Third, requires no such juggling of grammar. Instead one need apply only the standard and routine rule of *ejusdem generis* that "other," following an enumeration, is to be read as "similar." Adoption of this elementary precaution eliminates all surplusage and contradiction, and makes Section 14, Third, comport precisely with what the Congress plainly intended.

II

The Shipping Act, 1916, was the result of a comprehensive inquest into ocean shipping by the House Committee on Merchant Marine and Fisheries. Its report, known as the Alexander Report, is the foundation of that Act. The Congress in consequence of that report had full knowledge of both the abuses and the needs of ocean shipping.

The Alexander Committee recommended the statu-

tory approval of steamship conferences because "The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade." 4 Alexander Report 416. The struggle for cargo may at any time break into a rate war. This is because of six disruptive factors: (1) there is little difference in the operating cost of a vessel filled to capacity, and one sailing only half full; (2) a liner service must regularly send vessels, which are units of large capacity, into ports on the route it has developed, whether the cargo offerings are large or small; (3) there is complete freedom of entry by competitors into any international trade route; (4) there is no governmental authority to fix minimum rates; (5) there is large disparity in capital and operating costs between vessels under different flags, a factor which consistently operates to the drastic disadvantage of American-flag vessels; and (6) where outbound traffic largely exceeds inbound, there is necessarily too much inbound capacity.

An effective conference operating under the provisions of the Act can normally prevent the outbreak of rate wars. When, however, a trade becomes overtonnaged and a strong independent line exists, it is usually impossible for a conference to control rates merely by agreement among member lines. By undercutting the rates adhered to by the conference lines, the independent line can divert substantial and profitable quantities of traffic from member lines. In many cases this causes conference lines, either individually or by agreement, to abandon the tariff and meet the independent's competition. A ruinous rate war is the result. This is no more beneficial to shippers than to carriers, for the

nature of foreign commerce requires predictable and relatively stable rates.

The dual rate system enables a conference to meet the competition of independent lines, without resorting to a costly and disruptive rate war.

III

The legislative history of the Shipping Act, 1916, conclusively demonstrates that Congress impliedly approved the dual rate system where it is needed to promote stability in a trade. The methods used prior to 1916 by conferences to meet the competition of non-conference lines are precisely described in the report of the Alexander Committee. Among these were the dual rate system and two others—deferred rebates and volume discounts—somewhat similar to it. The Committee condemned the latter methods, while it described the dual rate system in terms free of any hint of disapproval. Unlike the deferred rebate system, the Committee said, "the ordinary discount system does not place the shipper in the position of continual dependence" and unlike the volume discount system, the dual rate system [gives] the small shipper the same contract rates as the larger shippers." These distinctions between the ordinary contract rate system, on the one hand, and the deferred rebate and volume contract system, on the other, were of central, rather than peripheral, importance in not only the Committee's thinking, but also in the structure of the ensuing legislation, for they were transferred bodily into Section 14 of the resulting enactment.

Section 14, Fourth, forbids unwarranted volume discounts. Section 14, First, outlaws deferred rebates, and defines that practice in the most precise terms.

Section 14, Third, which the Court below construed as a prohibition of the dual rate system, contains no references to rates or contracts. On the contrary, after condemning retaliation by refusal of space, it makes general reference to "resort to other discriminating or unfair methods", because a shipper has patronized another carrier "or for any other reason." The excessively broad construction placed by the Court below on Section 14, Third, makes Section 14, First, wholly superfluous, and it obliterates the fact, important in the Alexander Committee's deliberations, that the "ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system."

Because there can be no reconciliation between the holding below and the legislative history, the two opinions of the Court of Appeals are fundamentally inconsistent, even though all three judges concurred in both. The principal opinion, written by Judge Fahy, pays little or no attention to the legislative history, and finds the dual rate system illegal *per se*.

In contrast, the concurring opinion of Judge Washington does attempt to deal with the legislative history, but rejects the Board's arguments because, it says, the dual rate contracts considered by the Alexander Committee and given "implied congressional endorsement" (R. 247) were "requirements contracts" which provided the buyer a "guarantee of supply and guarantee of no rate increase . . ." (R. 247). In fact, the 1913 contracts described by the Alexander Committee are not materially different from the contracts in the instant case. The essence of both contracts is the promise of exclusive patronage by the shipper and the entitlement in return to a discount rate. The so-called

"requirements contracts," moreover, would themselves be equally retaliatory under the principal opinion.

Congress had clear warning from a committee of steamship lines (*infra*, p. 54) and from the recommendations in the Report of the Royal Commission on Shipping Rings (*infra*, p. 51), which are embodied in part in the Alexander Report, that if the deferred rebate system were outlawed it would inevitably be replaced by the contract rate system or a volume discount system. The Shipping Act did, in fact, outlaw the deferred rebate system in carefully circumscribed language, and it further prohibited unfair volume discount systems. It therefore must be read as impliedly approving the contract rate system which would inevitably replace the two condemned methods.

The Alexander Report removes all uncertainty that the prohibition against retaliation in Section 14, Third, was aimed only at the retaliatory denial by a line or lines of *service* to a shipper who had patronized a competing line or had otherwise incurred the displeasure of the carrier and not at any system of monetary discount such as the contract rate system. The shipper, it said (4 Alexander Report 288)—

> "could be penalized *by being denied accommodations for future shipments even at the full rates of freight. Such retaliation* would leave the shipper unprotected since an independent line is not large enough to supply him with tonnage at all times."

It is obvious that the retaliation with which the Committee was concerned was the blacklisting of shippers by denial of space for future shipments even at the full rate. Its language is concerned with denials

of *service*, of *vessel space;* on its face it has nothing to do with the imposition of a rate differential, or the payment of liquidated damages for a breach of the shipper's contract which the court below erroneously held to be retaliation. So far as contract systems based on *monetary* considerations were involved (such as the dual rate system), the Committee laid down the standards of legality with its recommendations against deferred rebates, unfair volume contracts, undue or unreasonable preferences or advantages, and unjust discriminations; recommendations translated by Congress into Sections 14, First, 14, Fourth, 16 and 17, respectively. And by its condemnation of retaliation, the Committee and Congress meant to prohibit as unlawful *per se* the enforcement of faithful patronage by *denial of service* by the carriers, a feature absent from the dual rate system.

Upon the slender thread of the omission of the routine word "unjustly" or "unfairly" in front of the word "discriminating" depends the reasoning of the Court below—central to its decision—that Congress in Section 14, Third, meant to condemn *any* discrimination, whether just or unjust, fair or unfair, substantial or insubstantial. This reasoning, even assuming *arguendo* that dual rates are retaliatory within the meaning of Section 14, Third, is inconsistent with that of other courts which have held that in a regulatory statute the bare term "discrimination" must be read to mean "unjust discrimination."

IV

The decisions of this Court establish that the dual rate system falls within the boundaries of lawfulness laid down in the Shipping Act. In *U. S. Navigation*

Co. v. *Cunard S. S. Co.*, 284 U.S. 474 (1932), this Court rejected the argument that the dual rate system was as a pure matter of law illegal under Sections 14 and 17 of the Shipping Act. Instead, the Court held that there were issues of fact and discretion which must first be resolved by the Board.

In *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297 (1937), this Court overruled the holding of a three-judge District Court to the effect that the dual rate system was illegal *per se*. Instead, this Court laid down the doctrine that:

> "In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter." (p. 304)

Most recently, in *Far East Conference* v. *United States*, 342 U.S. 570 (1952), this Court held that the question of the legality of the dual rate system falls within the primary exclusive jurisdiction of the Board, notwithstanding the argument rejected by the Court that such referral to the Board would be useless if, as was contended by the respondents, the dual rate system was unlawful *per se* under Section 14, Third.

The Shipping Board, the Secretary of Commerce, the Maritime Commission and the Federal Maritime Board, as each has succeeded to the responsibility of administering the Shipping Act, 1916, have ruled that dual rate systems are not invalidated by Section 14, Third, but will be approved or disapproved under Sec-

tion 15 according to the facts of each case. The responsible agency's interpretation of its governing statute is entitled to particular respect when the activity is so specialized as ocean shipping, and when the interpretation has been so long continued. Yet neither opinion of the court below even mentions this course of administrative rulings extending back for more than a generation.

The Board over this period has developed, in a sizeable series of contested cases; a set of highly discriminating standards to judge whether or not a particular dual rate system is unduly discriminatory. Approval under Section 15 will not be granted if one or a few lines would monopolize the trade; if the intercoastal trade, subject to Government rate control, is involved; if conference membership is not open to all on reasonable terms; if it is used to prevent use of other loading areas; if damages for breach are retroactive or unduly heavy; if the dual rate system will not remedy the causes of instability in the trade; if it will drive the non-conference lines out of the trade; if it will prevent use of the non-conference lines; if the differential is too high; or if it covers commodities not subject to non-conference competition.

Only if the dual rate system survives these tests will it be approved, and then only if it is shown that it is necessary to avoid rate wars, to permit forward-trading by shippers, and to assure rate stability and regularity of service.

This, we submit, adds up to a proper application of the criteria that were intended by Congress in the enactment of Sections 15, 16, and 17, to control the use of the dual rate system by conferences of ocean carriers.

ARGUMENT

Consequent to a painstaking and highly expert investigation of ocean shipping, the Congress 41 years ago enacted the Shipping Act, 1916. Its inquiry penetrated to the heart of the shipping business, and its report laid bare alike its evils and its needs. (H. Rept. No. 805, 63d Congress, 2d Sess. (1914), known as the Alexander Report.) For 40 years the evils condemned by the Congress in 1916 have been suppressed under the Act, while the needs of ocean shipping recognized by the Congress have been preserved. For 40 years the dual rate system, now in use by 62 conferences dealing with the foreign trade of the United States, has been a cornerstone in the stability of rates and services in ocean shipping.

We will demonstrate in this brief that the Board's power to approve the dual-rate system, which stems from Section 15 of the Act, is in no way abrogated or limited by Section 14, Third.

The Court below seems to accept on its merits the judgment of the Board that in proper cases "the dual rate system may be very potent in promoting stability and regularity of service and may be warranted by competitive considerations" (R. 242). It expressly ruled (R. 243).

> "Absent retaliation a preference or discriminatory rate is unlawful only if undue, unreasonable, unfair or unjust. Whether or not these characteristics exist depends upon the facts and circumstances of the case as found by the Board; and the courts will not substitute their judgment in this regard for that of the Board."

The Court below recognizes that its decision is compelled neither by precedent nor by the legislative history of the 1916 Act.

On what ground, then, does it undertake to strike down a basic operating method of the steamship indus-

try, sanctioned by more than a generation of decision and practice? On what ground does it declare that virtually every substantial shipping line has for a generation been violating the law, at a potential cost of a $25,000 fine for each offense? It is because the Court conceives that it has after 40 years discovered statutory words which—by its new reading—require this result.

Yet, as we shall show, this case does *not* present the familiar choice between the literal words of a statute and a sensible or the intended meaning. For the Court below has itself necessarily rejected the literal statutory words, and has added to those words ingredients designed to produce a rational result. We urge that a smaller, and less drastic, variation upon the statutory words would have reached a result which Congress plainly intended, a result which is necessary for the survival of the high-cost American merchant marine, and a result consistent with rather than contradictory of the decisions of this Court and the many decisions of the administrative tribunals which have from time to time been charged with the responsibility of interpreting and administering the Shipping Act, 1916. This we show in detail below.

I

THE HOLDING BELOW CONTRADICTS THE TEXT OF THE STATUTE

The Shipping Act, 1916, includes broad catch-all phrases at the end of one provision or another.[8] See-

[8] Examples are: (a) Section 14, Fourth, subjects the carrier to a fine of not more than $25,000 for every occasion when he should "unfairly treat * * * any shipper in the matter of * * * the adjustment and settlement of claims." In context it relates to things like discrimination based upon the volume of freight, and in fact no shipper has supposed that an indulgent Congress has given him so heavy a bludgeon in his negotiations with the claims

tion 14, Third, is probably the most extreme example. With paragraphing added for ready clarity, Section 14, Third, provides:

> "Sec. 14. That no common carrier by water shall, directly or indirectly * * * —
>
> * * * * * * *
>
> "Third.
> Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or
> resort to other discriminating or unfair methods,
> because such shipper
> has patronized any other carrier or
> has filed a complaint charging unfair treatment, or
> for any other reason."

If this section were read with the literalness which the respondents demand of this Court, it would make it unlawful for any common carrier by water to "resort to * * * discriminating * * * methods * * * for any * * * reason." This literal reading produces a flat and

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agents. (b) Section 15 requires that there be filed with the Board, for its approval, every written or oral agreement between carriers "in any manner providing for a * * * cooperative working arrangement." Read literally, Section 15 approval is required for every use of common facilities, every trade association activity, every jointly conducted litigation, and all of the day to day courtesies between freight traffic departments. (c) Section 18 requires "just and reasonable regulations and practices" relating to about a score of enumerated transportation activities, but nevertheless concludes with "all other matters relating to or connected with the receiving, handling, transporting, storing or delivering of property." (d) Section 20 forbids the disclosure of "any information concerning the nature, kind, quantity, destination, consignee, or routing of any property * * * which information * * * may be used to the detriment or prejudice of any carrier." The traffic data compiled, and disclosed to private parties, by the Maritime Administration and the Bureau of Census is often and properly used to the detriment of a carrier engaged in proceedings before the Board.

unqualified prohibition of *any* discrimination by a carrier for *any* reason.[9]

The liberal reading thus converts into unnecessary surplusage the following provisions of the Shipping Act: (a) Section 14, First, forbidding deferred rebates. (b) The remaining provisions of Section 14, Third, forbidding retaliation by refusing space accommodations to a shipper who has patronized another carrier. (c) Section 14, Fourth, forbidding various forms of discrimination based upon the volume of freight. (d) Section 16, First, forbidding undue or unreasonable preference, advantage, prejudice, or disadvantage. (e) Section 16, Second, forbidding transportation by any person at less than the regular rates. (f) Section 17 forbidding rates unjustly discriminatory between shippers.

The literal reading of Section 14, Third, would, in addition to making all of these provisions mere surplusage, convert much of Section 15 into an illusion. Where Section 15 purports to authorize agreements "giving or receiving special rates, accommodations, or other special privileges or advantages" or "providing for an exclusive, preferential, or cooperative working arrangement", and directs the Board to approve such agreements unless they are found to be "unjustly discriminatory or unfair" a literal reading of Section 14, Third, would make every such agreement unlawful and beyond the power of the Board to approve.

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[9] An alternative reading of the section is possible but involves an improbably awkward mixture of nouns and gerunds, i.e.:

> "Retaliate against any shipper by
> refusing, or threatening to refuse,
> space accommodations when
> such are available, or
> resort to other discriminating or
> unfair methods * * *"

A literal reading of Section 14, Third, is thus completely destructive of the heart of the Shipping Act; all of its major provisions would be either contradicted or converted into surplusage by an uncritical acceptance of the words of Section 14, Third, as they are written and without regard to what the Congress intended.

The Court below, did not accept a literal reading of Section 14, Third. It made a partial application of the rule of *ejusdem generis*, and went part way toward a sensible reading, by relating the prohibition against discriminating methods to retaliation (R. 242-244, 246),[10] and basing it on the patronage of another carrier (R. 242, 246). But the Court did not succeed in rationalizing the statute. For if Section 14, Third, as the Court below held, forbids *any* discrimination against a shipper for patronizing another carrier; then the Congress had no occasion whatever to enact in Section 14, First, its detailed description and prohibition of deferred rebates. These practices are incontestably included within Section 14, Third, as that section is

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[10] We do not consider it important that the Court of Appeals is plainly wrong in its understanding of "retaliation," since a literal reading of Section 14 alone reaches to the dual rate system, along with almost every other steamship practice, whether or not "retaliatory." But it may be noted that a decent respect for the dictionary shows that to retaliate is (e.g. Webster):

> To return the like for; to repay or requite in kind, as an injury; to put or inflict in return (upon) * * *

To deny space or shipping service to one who has patronized another is, as the Congress recognized, to "retaliate." To offer a lower rate for exclusive patronage is to induce, not to retaliate. This is made entirely clear by the fact that the shipper who has patronized the non-conference line has full benefit of the dual rate system when he signs the contract; he has been induced, not retaliated against.

construed by the Court below. That Court, by its revision of Section 14, Third, has managed to avoid most of the anomalies produced by a literal reading of its words. But it has not eliminated all; the Congress could not reasonably have enacted both Section 14, First, and Section 14, Third, as it is construed by the Court below. Its construction of the statute is accordingly, and at best, a suspect one.

We urge that the Court should carry the rule of *ejusdem generis* a hand's breadth farther than did the Court below and also relate Section 14, Third, to the refusal of space accommodations and related services necessary for the transport of goods. Such, as we show below, was the plain intention of the Committee which framed the bill. In short, Section 14, Third, is not a flat prohibition of *every* discrimination, making the bulk of the Act unnecessary or unenforceable. No more is it a flat prohibition against any form of discrimination based upon the use by the shipper of other carriers. If the retaliation and patronage clauses, notwithstanding the literal reading of the section, are to qualify the prohibitions of Section 14, Third; then by like token the space accommodations clause, notwithstanding a literal reading of the paragraph, must also qualify its prohibitions, if this reading is required to reconcile the evident intention of the Congress with the words it used.

The grammar of Section 14, Third, need not be revised so extensively as was done by the Court below. That Court was required, in order to make the statute fit its reading, to make the independent "or resort" clause over into a clause modified by the "retaliation" clause, and further to read it as modified by the patronage clause without regard to the "any other reason"

clause. In contrast, the statute makes sense with a much smaller departure from literalness. We urge only that "other" be read as "similar" in the second and the last clause.

This is a familiar, and indeed almost a standard, application of the rule of *ejusdem generis*.

> "The rule finds application and has frequently been applied where such terms as "other," "any other," "others," "or otherwise," or "other thing" follow an enumeration of particular classes, and where this occurs such words are to be read as "other such like," and are to be construed to include only others of like kind or character." (82 C.J.S., Statutes, sec. 332, p. 662; see also 50 Am. Jur., Statutes, sec. 249, p. 246)

Thus, this Court has unfailingly read the Mann Act, forbidding interstate transportation of "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose" as requiring a purpose similar in kind to prostitution or debauchery. *Cleveland* v. *United States*, 329 U. S. 14, 18 (polygamy); *Caminetti* v. *United States*, 242 U. S. 470, 487 (concubinage). A statute forbidding mergers by insurance companies, banking companies, savings banks, "or other corporations" does not apply to mergers by non-financial corporations. *Clarke* v. *Gold Dust Corporation*, 106 F. 2d 598, 602 (3 Cir. 1939). A statute taxing oil, gas, gasoline, and "other combustibles" does not apply to coal. *In re Bush Terminal Company*, 93 F. 2d 659 (2 Cir. 1938).

This simple, indeed routine, construction of the catch-all phrase "other" in Section 14, Third, not only eliminates all contradictions, surplusages and absurdities from the Shipping Act, it also brings the Section

into complete harmony with what Congress quite plainly intended to do.

II

THE INSISTENT ECONOMICS OF OCEAN SHIPPING

To determine the intention of the Congress it is as necessary now as in the day of Lord Coke to give heed to the conditions which the legislature sought to remedy! *Heydon's Case*, 3 Co. 7a, 76 Eng. Rep. 637 (1584); *Preston* v. *Browder*, 1 Wheat. 114, 121; *Holy Trinity Church* v. *United States*, 143 U.S. 457, 463; *United States* v. *Alpers*, 338 U. S. 680, 683-684. These conditions, in the case of the Shipping Act, are not speculative, but are precisely demonstrable both out of common knowledge and by what the authoritative report of the Congress spelled out.

It has been recognized for half a century and more that pure competition, however desirable it may be in other fields of economic activity, is far more detrimental than beneficial in the field of ocean shipping. Some form of control or restraint upon competition is necessary; and in the absence of some such control, it is the lesson of history that economically wasteful rate wars will result, with possibly chaotic effects. Shippers who operate on the basis of advance trading commitments cannot make such commitments if there is no rate stability (4 Alexander Report 296-298),[11] and carriers in such case can neither maintain regular service or maintain reserves necessary for fleet re-

[11] For an explanation of the advantages to shippers of stable rates, see Johnson, E.R. and Huebner, G.G., *Principles of Ocean Transportation*. (Appleton & Co., New York, 1918), pages 300-301.

placement and improvement (4 Alexander Report 295, 297).[12]

The Alexander Committee gave primary recognition to this fact and upon it premised its whole legislative approach to the problems of competition in ocean transportation:

> "*The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade.* Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle they would consolidate through common ownership." (4 Alexander Report 416) (Emphasis added here, and in all other quotations herein.)

What was true in 1914 when the Congress considered the entire problem in formulating the Shipping Act is equally true today. Those forces which operate to cause mutually destructive rate wars and which are inherent in ocean shipping may be summarized as follows:

(1) The cost of carrying additional units of cargo on a vessel is extremely low. The cost of operating a vessel is substantially the same whether it goes out full

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[12] The effect of rate wars on the competing lines is explained, Johnson and Huebner, *op. cit.*, page 284. See also *North Atlantic Continental Freight Conference*, 4 F.M.B. — (1956), mimeo opinion, p. 14.

or half full. A vessel already committed to the voyage "profits" by filling otherwise empty space so long only as the rate exceeds the costs of loading and discharge. The result, where there is no effective restraint upon competition, is likely at every port to be a fierce and destructive struggle for cargo by reducing rates to the level which will fill the vessel.[13]

(2) Liner (i.e., berth or common carrier) steamship services operate on regular schedules between regular ports of call. It would often be preferable for such a service to cut its rates at a given port, rather than to abandon the port completely to its competition or to sail empty. In contrast to a railroad, which can dispatch to any particular point only the number of freight cars necessary, the whole of the liner must put in at each port.

(3) There is complete freedom of entry into trade upon the high seas. Every vessel of any flag is free at will to call at any port. As a result desirable trades tend to become overtonnaged. This is especially true where a temporary abundance of cargo brings into a trade new lines which fight to exist when traffic declines. In contrast, carriers in other comparable fields of transportation, surface or aerial, are permitted to enter a particular service only after authorization has been secured from a regulatory body.[14] See *North*

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[13] See Marx, Daniel Jr., *International Shipping Cartels* (Princeton University Press, 1953), pp. 21-22.

[14] The Transportation Act of 1920 made the initiation of new railroad service conditional upon a finding by the I.C.C. that the new service was required for the "public convenience and necessity." 49 U.S.C. 1(18). Upon enactment of regulatory authority over domestic motor and water carriage, in 1936 and 1940, re-

Atlantic Continental Freight Conference, 4 F.B.M. — (1956), mimeo opinion p. 16.

(4) The international nature of ocean foreign commerce makes it difficult or impossible for a single national authority to fix minimum rates, and thus to prevent rate wars.[15] In domestic commerce, regulatory bodies, like the Interstate Commerce Commission, have been vested with the power to fix minimum rates "to keep in competitive balance the various types of carriers and to prevent ruinous rate wars between them." *New York v. United States*, 331 U. S. 284, 346 (1947).

(5) There are great cost differences, both capital and operating, between the carriers of different nationalities (R. 56). In an overtonnaged market there is a great competitive advantage to carriers operating

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spectively, similar conditions were imposed upon new services in those fields of transportation. 49 U.S.C. 206, 49 U.S.C. 309. The Civil Aeronautics Act of 1938 made the initiation of new domestic or foreign air service conditional upon a finding of the C.A.B. that the new service provided by citizens of the United States was required for the "public convenience and necessity" or that the new service provided by non-citizens "will be in the public interest." 49 U.S.C. 481. No such controls exist in ocean foreign commerce.

[15] H. R. 10500, 64th Cong., 1st Sess., proposed a direct system of governmental regulation of foreign commerce whereby conferences would not be specifically recognized and an administrative board would be established with power "* * * to determine and prescribe just and reasonable rates or charges to be demanded or collected for the transportation of passengers and property * * *" and to issue licenses without which vessels could not engage in the foreign trade of the United States. Pages 516 to 521 of the hearings on the bill contain testimony outlining the objections to such a system of regulation, and the Alexander Committee concluded that ocean foreign commerce is not susceptible to direct rate control by any one national government. 4 Alexander Report 309-311, 420-421.

under flags where operating costs are low. Such carriers may still realize a profit even though they charge lower rates than carriers operating under other flags. This is a consideration of prime importance to those responsible for the welfare of the American merchant marine, since the operating costs of a U. S.-flag vessel are more than twice those of the next highest cost merchant marine. See *Review of Direct and Indirect Types of Maritime Subsidies*, U. S. Department of Commerce, April 1956, p. 20.

(6) In many trades, the outbound cargoes from the United States are much greater than those inbound. The fleet necessary to carry the outbound traffic will inevitably overtonnage the inbound trade. *Trans-Pacific Freight Conference of Japan*, 4 F.M.B. —, served March 5, 1956, mimeo opinion, p. 6.

These factors necessitate the establishment of some restraint upon competition between carriers. By Section 15 of the Act, Congress evidenced its endorsement of this principle, and, as recommended by the Alexander Committee, it thereby permitted carriers to join in conferences for the purpose of controlling competition. An effective conference operating under the provisions of the Act can normally prevent the outbreak of rate wars, by providing a forum, as it were, in which the carriers in the trade can agree upon a single tariff which will prove acceptable to the shippers and to which all lines will adhere. When, however, a trade becomes overtonnaged and a strong independent line exists, the nature of ocean shipping will often make it impossible for the conference to control rates merely by agreement among themselves. By undercutting by a fixed percentage the rates adhered to by conferences lines, the

independent line can divert substantial quantities of traffic away from the conference lines, can fill its vessels to a much greater degree, and can thereby comparatively reduce its carrying cost per ton. See Marx, Daniel Jr., *op. cit.*, p. 196.

Thus, the uniformity of the conference's rate enables an independent to operate profitably, and ordinarily more profitably than the conference lines, despite its lower rates. Once the conference members are seriously hurt by the independent's rate-cutting, the conference is strongly impelled to abandon its rate structure and to declare rates "open"—i.e., to permit each of the members to fix its own rates independently. All lines, including the independent, are then placed in a position of unrestrained competition, and low operating costs become the main index of ability to survive. In a situation of this sort, American-flag lines are by far the most vulnerable, for ship operating and construction costs under United States registry are, and historically have been, materially higher than under any other.[16] Moreover, shippers are injuriously affected, because, as in the instant case, the instability of rates and service makes forward trading risky. The advan-

[16] "It must be clearly recognized that the conference system has assisted in the establishment of an American merchant marine where before it had little chance of survival. * * * The rates have been set high enough to allow the American operator to at least meet his out-of-pocket costs of operation, and while the foreign operator has many advantages, not the least of which is greater profits on his operation, the fact remains that from the standpoint of national security and from the point of view of the American shipper, the conference system has paid off in stability of rates and improved quality of service." Report of the Magnuson Subcommittee of the Senate Committee on Interstate and Foreign Commerce (S. Rept. No. 2494, 81st Cong., 2d Sess., at page 86, August 30, 1950).

tage of having a low, but variable ocean rate, is ought weighed by the advantage of having a stable, even though somewhat higher, rate.[17] Such is the testimony of the shippers in this case, and such was the finding of the Board (R. 32, 33-34).

The economic damage to the independent line, such as Isbrandtsen, which results from a rate war, may be far greater than that which results from the dual rate system. The Board, in its review of proposed dual rate systems as prescribed in Section 15, can regulate the differential or spread of rates to an amount that will minimize the harmful effect on the independent and at the same time prevent the disastrous effect of rate wars on *all* the carriers.[18] Here, Isbrandtsen has

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[17] The Alexander Report states:

"Moreover, as has been repeatedly pointed out in this volume, shippers require, above all else, a regular service * * *" (4 Alexander Report 288).

[18] In the instant case, the Board held:

"The spread between contract and non-contract rates in the proposed system, based in part on the percentage by which Isbrandtsen most frequently underquotes conference tariff rates will reasonably enable the conference to meet Isbrandtsen's competition *without*, as in the method of uniform conference rate reduction preferred by Isbrandtsen, eliminating a *single* American carrier from the trade.

"While Isbrandtsen's share of the traffic may, as stated, be reduced, we do not anticipate that such increase in conference controlled traffic will result in the traditional evils associated with monopoly. The continued participation of Isbrandtsen in the trade, as well as the existence of strong shipper organizations, stand as a strong deterrent against exorbitant freight rates and other objectionable monopolistic practices. In any event this Board has full power over those rates of conference carriers in foreign commerce which are detrimental to the commerce of the United States" (R. 64-65; Emphasis the Board's).

been practically eliminated from the trade as a result of the rate war. Under the dual rate system, Isbrandtsen would probably carry approximately 10 percent or more of the cargo moving in the trade, which favorably compares with the expected average of the conference lines (R. 31, 62).

The dual rate system enables a conference to meet the competition of independent lines, without resorting to a costly and wasteful rate war.[19] Where the Board finds that grave instability exists, it may properly conclude that the danger to shippers and carriers justifies the introduction of a dual rate system, notwithstanding the force of its restraint upon competition. Absent the finding of grave instability, the Board does not consider the system justified, and it will not permit its use.[20]

In the instant case, the Board found that the Japan/Atlantic trade was overtonnaged; that the independent Isbrandtsen had been setting its rates at a fixed percentage below those of the Conference; that an injurious rate war was prevalent in the trade following the opening of rates; that many shippers had sought

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[19] As we shall show, the dual rate system, and other substantially similar contract systems, were widely used in the foreign commerce of the United States at the time of the Alexander Committee's investigation. At the present time, the dual rate system is employed by 62 conferences. It is, therefore, and has long been, a common, rather than an extraordinary, feature in American foreign trade.

[20] *Trans-Pacific Freight Conference of Japan*, 4 F.M.B. — (1956); also see: *Japan-Atlantic and Gulf Freight Conference*, 4 F.M.B. — (1955) (which is here under review); *North Atlantic Continental Freight Conference*, 4 F.M.B. — (1956).

Other safeguards which must exist before the use of a dual rate system will be approved are mentioned below at p. 71.

the restoration of a conference tariff; and that the resulting condition of grave instability had adversely affected the smooth flow of Japanese-American trade, the value of inventories of Japanese goods in the United States, and the ability of merchants to conduct business on the customary basis of advance commitments. Based on these findings, and in the light of its expert judgment in ocean shipping matters, the Board properly concluded that the instability in the trade justified the introduction of the dual rate system. The rationale of the action followed the doctrine set forth by this Court in *Swayne & Hoyt* v. *United States*, 300 U. S. 297, 304 (1937), in another dual rate case:

> "In determining whether the present discrimination was undue or unreasonable the Secretary [the Board's predecessor] was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter."

III

THE LEGISLATIVE HISTORY OF THE ACT DEMONSTRATES THAT CONGRESS DID NOT INTEND TO PROHIBIT THE DUAL RATE SYSTEM

The Congress, as we shall show in this section, was both aware of and sensitive to the critical needs of the ocean shipping industry. The history which follows leaves it in our view indisputable that the Congress (a) recognized the existence of the dual rate system, but (b) in contrast to more objectionable practices did not condemn it, and instead (c) left it to the Board to approve or disapprove according as the impact of a particular

arrangement might be unfair, unjust or unduly discriminatory.

The Congressional intention is written plain in the massive report of the House Committee on Merchant Marine and Fisheries, consequent to its detailed investigation of the ocean shipping industry. (H. Doc. 805, 63d Cong., 2d Sess., known as the Alexander Report.) The Shipping Act, 1916, grew out of this report and reflected its recommendations.[21]

We note at the outset that, on this critical issue of Congressional intention, the two opinions of the Court of Appeals are fundamentally inconsistent, even though all three judges concurred in both. The principal opinion, written by Judge Fahy, pays little or no attention to the legislative history. It does no more than to concede that the Court considered the legislative history and found no indication therein of an explicit intention to outlaw the dual rate system (R. 244-245), but it holds flatly that, "Since the dual-rate system here constitutes retaliation it must be condemned without regard to the question of its reasonableness, as are deferred rebates" (R. 243).

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[21] The Alexander report was prepared by the House Committee on the Merchant Marine and Fisheries pursuant to resolutions in the 62nd Congress (H. Res. 425, 587) and the 63rd Congress (H. Res. 205), and was submitted during the 63rd Congress in 1914 (H. Doc. 805, 63rd Cong., 2nd Sess.). A bill largely carrying out the recommendations of the Report was introduced (H. R. 17328), but not passed. In the 64th Congress the bill was reintroduced in substantially the same form (H. R. 15455, 64th Cong., 1st Sess.) and the report of the Committee recommending the bill quoted verbatim the recommendations of the Alexander report and stated that the bill had been framed in large part on the basis of its recommendations. H. Rept. 659, 64th Cong., 1st Sess., 27. The Senate Committee also adopted the recommendations of the Alexander report. S. Rept. 689, 64th Cong., 1st Sess.

In contrast, the concurring opinion, written by Judge Washington, does attempt to deal with the legislative history. It rejects the Board's arguments as to legislative intent on the ground that the dual rate contracts considered by the Alexander Committee and given "implied congressional approval" (R. 247) were "requirements contracts" which provided the buyer a "guarantee of supply and guarantee of no rate increase . . . . " (R. 247). In attempting to distinguish two types of dual rate contracts, Judge Washington reaches a conclusion at variance with the conclusion in Judge Fahy's opinion that all dual rate contracts are illegal. The one opinion would bar any dual rate system; the other would permit such a system if it embodied a "requirements contract." The one opinion held the dual rate system illegal *per se*; the other only because the contract here involved did not seem to the judges below to be a "requirements contract" as they understood the term.

As we shall show, this supposed distinction relied on in the Washington opinion is fallacious, as the 1913 contracts and the contracts in the instant case are not significantly different. Moreover, the 1913 contracts included the very same elements which the principal opinions below found to be the illegal retaliation inherent in dual rate contracts.

A. The Alexander Committee Described and Absolutely Condemned Certain Specific Carrier Practices, But Not the Dual Rate System.

The Alexander Committee heard considerable testimony relating, *inter alia*, to "the unfairness of *certain* methods—such as fighting ships, deferred rebates, and threats to refuse shipping accommodations—used by some conference lines to meet the competition of non-

conference lines." 4 Alexander Report 417. In the fourth volume of the Report, the Committee set forth a "Summary of Conferences and Agreements," in which it recapitulated the evidence that it had accumulated; and at 4 Alexander Report 287-293, the Committee described the practices then used by conferences for the purpose of "Meeting the competition of lines outside of the conference."

The first two practices described were deferred rebates and fighting ships. These were condemned by the Committee and it went on to recommend "That the use of 'fighting ships' and deferred rebates be prohibited in both the export and import trade of the United States." 4 Alexander Report 421. The next practices described were (p. 290):

"3. Contracts with shippers which may be classified as:

> "(a) Joint contracts made by the conference as a whole.—Such contracts are made for the amount of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and *the shipper agrees to confine all shipments to conference steamers*, and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. *The rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i.e., are willing at all times to contract with all shippers on the same terms.*[22]

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[22] Under the similar dual rate contract involved in the instant case, the shipper promises to patronize exclusively the vessels of the Conference lines and the carriers collectively undertake

"(b) Contracts made by the individual members of the conference, which are open to small and large shippers alike, irrespective of the size of the shipment. * * * The shipper agrees to give the steamship line his *entire* shipments to certain designated ports during a definite period, and the line obligates itself to provide tonnage at definitely prescribed rates for all shipments offered, provided reasonable notice of intention to ship is given * * *. If the line reduces its rates to any other shipper during the period of the agreement it is usually provided that the shipper with whom the contract was made should be given the benefit of all such reductions during the period that the lower rates remain in force. * * *

"(c) Contracts with large shippers either for all their freight or for certain important articles forming the main basis in a given trade, *at lower rates than those charged on similar goods, if shipped in small quantities.* * * *"[23]

The Committee also enumerated another method of "Meeting the competition of lines outside of the conference" consisting of preferential agreements between domestic railroads and ocean lines with respect to use of docks, furnishing of freight, etc. 4 Alexander Report 292. The Committee recommended policing of such railroad activity by the Interstate Commerce Commission, 4 Alexander Report 423-424, and accordingly, no

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to maintain a shipping service adequate to meet the reasonable requirements of the trade and to carry the contracting shipper's cargoes "at the contract [lower] rates set out in the tariff . . ." (R. 203-204).

[23] Contracts based upon volume of shipment were outlawed by Section 14, Fourth, of the Act, where they were "unfair or unjustly discriminatory" with respect to small shippers.

legislation on this subject matter was embodied in the Shipping Act.

It is manifest that the above practice 3(a), described by the Committee as "Joint contracts made by the conference as a whole", precisely comports with the dual rate system here approved by the Board, encompassing the identical features of discount rates and exclusive patronage.[24] Moreover, unlike the Committee's description of deferred rebates and fighting ships, this description is entirely free of any hint of condemnation. On the contrary, these contracts are described with approbation as "giving the small shipper the same contract rates as large shippers, i.e., are willing to contract with all shippers on the same terms." This is a significant feature of the dual rate system, for the Committee subsequently recommended, 4 Alexander Report 421, and Congress enacted (in Section 14, Fourth) a prohibition against contracts which are unfair or unjustly discriminatory in respect of small shippers.

In the subsequent enactment of Section 14, Congress precisely described and in absolute terms condemned the "deferred rebate" and "fighting ship", as those practices were described and condemned by the Committee. The contract rate system was also precisely described, but not condemned, by the Committee. Significantly, this practice was not mentioned or described in the statute. Had Congress intended absolutely to condemn the contract rate system (as the Court below has erroneously held), it would surely have described this method as it did the deferred rebate

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[24] The following section of this brief will discuss in detail the shipper contracts reported in the Alexander Report.

and fighting ships, and expressly prohibited it. *But the contract rate system was not so prohibited*, nor was any such prohibition intended, even implicitly, in Section 14, Third.

This conclusion is more than surmise. It is compelled by an analysis of the rationale expressed in the Committee's discussion of the methods used by conferences in meeting non-conference competition.

In describing deferred rebates, the Committee emphasized that (4 Alexander Report 287):

> "Since the time of payment of the rebate follows the period for which it is computed, the shipper, if he desires to obtain the rebate, *is under constant obligations to the conference lines*, and is prevented from patronizing any other service since that act would mean the forfeiture of all accumulated rebates."

The Committee went on to point out (4 Alexander Report 307):

> "That deferred rebate systems are objectionable and should be prohibited for the following reasons:
>
> "(1) By deferring the payment of the rebate until three or six months following the period to which the rebate applies ship owners effectively tie the merchants to a group of lines *for successive periods. In this connection it is argued that the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system.*"

The feature of the deferred rebate system which outraged the Committee was its placing of shippers in *continual dependence*. Section 14, First, was so phrased as to make absolute the prohibition against this feature. *It is most significant that the Committee*

here took pains to distinguish this condemned system from the "ordinary contract system," which "does not place the shippers in the position of continual dependence."[25]

A similarly vital distinction was made when the Committee turned its attention to volume discount contracts, later prohibited by Section 14, Fourth. These were described as "Contracts with large shippers either for all their freight or for certain important articles forming the main basis in a given trade, at lower rates than those charged on similar goods, if shipped in small quantities." 4 Alexander Report 291. The vice of these contracts lay in the fact that they were available only to large shippers, and the lower rate would attach to all shipments, *large or small,* made by such shippers. Thus, even a small shipment would move at a lower rate than a similar shipment by another shipper unable to offer a volume movement. 4 Alexander Report 186-187, 219-221, 291-292.

It was this feature of the volume discount system—*its unavailability to small shippers*—that offended the Committee and led to its condemnation. Again the Committee considered it relevant to note that the offensive feature of the volume contracts was absent from "the ordinary contract system"—the dual rate system—which gave "the small shipper the same contract rates as the large shippers." 4 Alexander Report 290.

It is therefore beyond doubt that the Committee held the dual rate system acceptable. It described the system, and two others somewhat similar to it (deferred rebates and volume discounts) in unmistakably clear

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[25] The Committee's distinction between deferred rebates and the dual rate system was recognized by the Supreme Court in *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297, 307, n. 3 (1937), quoted at p. 65, *infra.*

terms, and condemned the latter, while its description of the former is free of any hint of disapproval. It expressly called attention to the vice in each of the condemned systems, and took pains to point out that those vices did not inhere in the dual rate system. Unlike the deferred rebate system, said the Committee, "the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebated system"; and unlike the volume discount system, the dual rate system "[gives] the small shipper the same contract rates as the large shippers." (4 Alexander Report 290, 307).[26]

The distinctions between the ordinary contract rate system, on the one hand, and the deferred rebate and

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[26] In 1918, Professor Emory R. Johnson, who, in the words of Chairman Alexander, gave the Committee the "benefit of [his] advice and service in framing" bills leading to the Shipping Act, 1916 (Hearings on H. R. 14337, 64th Cong., 1st sess., p. 10), and Professor Grover G. Huebner, published *Principles of Ocean Transportation*, on pp. 298-299 of which they discussed "Methods of Controlling Competition of Non-Conference Lines." They first described deferred rebates and stated "The system is now illegal under the Shipping Act of September, 1916 . . ." Next they described the use of fighting ships which they stated "is also prohibited by the Shipping Act of September, 1916." The third and last method they describe, but which they do not intimate is prohibited in every case by the Shipping Act, is as follows:

> "Conference lines, either individually or as a group, may also make contracts with shippers, whereby in return for reduced rates and an agreed service the shippers agree to dispatch via the conference lines their entire shipments to certain ports during agreed periods. The privilege of securing such contracts is usually open to all shippers alike, but has at times been a source of discrimination. Contracts have been made with large shippers for all or a part of their freight at lower rates than those quoted on smaller quantities of similar commodities. The Shipping Act, however, prohibits unfair discriminations in the future. * * *"

volume contract system, on the other, were of central, rather than peripheral, importance in not only the Committee's thinking, but also in the structure of the ensuing legislation.

Section 14, First, which outlaws deferred rebates, defines that practice in the most precise terms. Section 14, Third, which the Court below construed as a prohibition of the dual rate system, contains no reference to rates or contracts and no such precise definition of retaliation; on the contrary, it speaks in such general terms as "resort to other discriminating or unfair methods" because a shipper has patronized another carrier "or for any other reason." It is clear that, if the general language of Section 14, Third, condemns the dual rate system, it must *a fortiori* condemn the far more restrictive and retaliatory deferred rebate system and there would have been no need whatsoever for the enactment of Section 14, First. The excessively broad construction placed by the Court below on Section 14, Third, makes Section 14, First, wholly superfluous, and it obliterates the fact, important in the Alexander Committee's deliberations, that the "ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system" 4 Alexander Report 307.

B. The Dual Rate Contract Found by the Court of Appeals to be Illegal *Per Se* Is Not Significantly Different From the Contracts Implicitly Approved by the Alexander Committee.

The failure of the Alexander Committee to recommend, and of the Congress to enact, a specific prohibition against use of the dual rate system cannot be ascribed to the asserted fact that the system was unknown when the Act was under legislative considera-

tion. Contrary to the assertion in the concurring opinion of Judge Washington of the Court below, contract rate systems were in wide use prior to the enactment of the Act. Such systems were well known to the Alexander Committee, and they differed in no material respect from the system proposed in the instant case by petitioner Japan Atlantic and Gulf Freight Conference, or those presently used in many other trades.

Numerous examples of contract rate systems were reported to the Alexander Committee and it summarized this carrier practice as follows—a definition on all fours with present-day dual rate systems:

> "(a) *Joint contracts made by the conference as a whole.*—Such contracts are made for the account of all the lines in the agreement, each carrying its proportion of the contract freight as tendered from time to time. The contracting lines agree to furnish steamers at regular intervals and the shipper agrees to confine all shipments to conference steamers, and to announce the quantity of cargo to be shipped in ample time to allow for the proper supply of tonnage. The rates on such contracts are less than those specified in the regular tariff, but the lines generally pursue a policy of giving the small shipper the same contract rates as the large shippers, i.e. are willing at all times to contract with all shippers on the same terms." 4 Alexander Report 290.

The Committee's investigation brought to its attention many contract rate systems of this type. A sample of such contracts, in pertinent part, is as follows (1 Alexander Report 248):

"New York, January 21, 1910

"Messrs. Guinle & Co.,
New York City.

"Dear Sirs: We hereby beg to confirm freight agreement made with you by us, acting for the Prince Line, Lamport & Holt Line, and Hamburg-South American Steamship Co., and Hamburg-American Line (joint service). This agreement to cover the transportation of your entire shipments of lawful merchandise from New York to ports in Brazil named below, on the following terms:

"For Pernambuco, Rio de Janeiro, and Santos: Electrical and other machinery (electrical fittings), $7 per ton, weight or measurement, ship's option; transmission towers (structural material), $6 per ton, weight or measurement, ship's option; curved plates $6 per ton . . .; car material, $6 per ton . . .; paint and varnish, $7.50 per ton . . .; copper wire, $7.50 per ton . . .; lubricating oil, 15 cents per cubic foot-landed.

* * * * *

"The steamship lines agree to provide space on receipt of ample notice of your requirements by streamers of the Prince Line, Lamport & Holt Line and Hamburg-South American Steamship Co., and Hamburg-American Line (joint service).

* * * * *

"This contract to run during the current month and the three following months and to run thereafter subject to 30 days' notice of withdrawal on the part of either party, but such notice not to be given before April 1, 1910.

Yours faithfully,
Paul F. Gerhard & Co.
General Agents

Accepted:
Guinle & Co."

Similar contracts at the same rates were offered to all shippers in the trade, large or small. The contract rates were lower than the rates charged non-contract shippers (1 Alexander Report 264).

The report to the Committee from the United States Consul General at Rotterdam, Netherlands,[27] includes a letter from a shipper describing "the terms on which we ship goods to the United States." The letter, in part, states (3 Alexander Report 90):

> "The Holland-American Line has an agreement with the principal Belgian, English, Canadian, and German steamship companies, constituting the North Atlantic pool or steamship conference on the understanding of mutual support and uniform ocean freights, and their method under this agreement is to publish a tariff of freights from European to American ports on equal basis, whether payable at the ports of shipment or of destination, *but they are granting special lower freights on same basis of payment to those contracting shippers or consignees who for the running year or season promise in writing, that they will ship all their goods, or will have these shipped, by the steamers of the conference lines. No rebates are allowed to anyone.* Contracting firms will be at liberty to use non-conference steamers, when American consignees, paying the freight, wish them to do so, and in the latter case such shipments will not be deemed a deviation from the contract, and such shippers will continually

[27] The Alexander Committee, through the cooperation of the Department of State, received reports from diplomatic and consular officers of the United States in foreign countries. These reports constitute Volume 3 of the Alexander Report.

enjoy for the time named the lower freights stipulated therein."[28]

In those cases where rate contracts were made with shippers by individual conference members, the practice was for all practical purposes the same as if the contracts were made jointly by the conference, since the conference would set the contract rates for its members as well as the tariff rates (1 Alexander Report 98).

The Court of Appeals erroneously believed that there were material distinctions between the contracts examined by the Alexander Committee which the Court calls "requirements contracts", and the dual rate contract now before the Board (R. 247).

> "But the fact is that the contracts examined by the Alexander Committee in 1913 were materially different from the contracts before us now. The 1913 contracts were bona fide requirements contracts. The sellers (carriers) undertook a firm obligation to provide space; both parties undertook firm obligations as to the price. And since the price was fixed for the term of the contract (usually six months) the price figure in the contract represented a hedge on the part of both parties against fluctuations in rates. In the contracts in suit the carriers' commitment as to space is

[28] It must be emphasized that the system herein described does not cover f.o.b. or f.a.s. shipments (in which the consignee, and not the consignor, pays the freight and controls the routing). The Board's decision in the instant case, in like fashion, excludes such shipments from the coverage of the system; that is, the contract permits a consignee to nominate a non-conference vessel. The system described in the letter, and that presently before this Court, are remarkably similar in this, as in every other material feature.

> almost illusory, being a commitment to carry 'so far as regular services are available.' The price aspect of the contract is in terms subject to increases. Thus, the two principal considerations normally given to a buyer (the shipper) under a requirements contract-guarantee of supply and guarantee of no rate increase—are here lacking * * *" (Court's footnotes omitted).[29]

Here the Court of Appeals is plainly in error. The contracts implicitly approved by the Alexander Committee and the contracts in the instant proceeding are not materially different in any feature relevant to this case. As noted in the Committee's description of "Joint contracts made by the conference as a whole," the shipper of 1913, exactly as does the shipper of today, agreed to confine *all* shipments to conference vessels and in return received a lower rate than non-contract shippers. These features—the promise of exclusive patronage and the entitlement in return to a discount rate—are the essential features, and they are no different in today's contracts. The Court of Appeals, in its principal opinion held that the dual rate contracts in every case constitute retaliation because they provide for liquidated damages and because the non-contracting shipper is required to pay a higher rate. The Court failed to see what is apparent: that the so-called "requirements contracts" would themselves be equally retaliatory; for (a) if they had the

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[29] Yet the Court concedes in footnote 8, p. 14, of its opinion that "In most of these contracts the price term was fixed as against increases, but shippers were entitled to any decreases in the regular tariffs." In this respect, they did not represent "a hedge on the part of both parties against fluctuations in rates," as erroneously stated in the concurring opinion below.

force of contracts at all, they imposed upon contracting shippers an obligation to pay damages (whether or not liquidated in the contract is immaterial) for a breach, and (b) as in the presently proposed system, non-contracting shippers were required to pay higher rates. In purpose and in effect, the 1913 contracts and the dual rate contracts of today are exactly the same—to provide a contract system less harsh than the deferred rebate system believed by the carriers in 1913 to be illegal under the anti-trust laws in the outbound trades from the United States,[30] and now explicitly condemned by Section 14, First.

Although the 1913 contracts were not in every detail similar to the dual rate contract at bar, the points of difference are not in any way material. These points are:

1. The 1913 contracts fixed prices for different classes of freight for the term of the contract—usually six months (R. 247), but sometimes, as in the New York/Brazil agreement quoted above, only for three and a fraction months. The contracts in the instant case provide that "Increases shall not become effective until the expiration of the calendar month during which notice is given and of the two calendar months next following. * * * Should the Carriers during the period of this Agreement reduce rates on any commodity on which contract rates are applicable, the Shipper shall be given the full benefit of such reduced rates * * *"

[30] 1 Alexander Report 154-155; 4 Alexander Report 288-289. The lines were of the opinion that rebates were not illegal in the inbound trades because the United States had no jurisdiction if arrangements were made abroad and rebates paid at a foreign port. They therefor used the deferred rebate system extensively in the trades to the United States.

(R. 203). Thus, the price provisions in the 1913 contracts differ only as to the period (two to three months as compared with six months) during which the price guarantees are to last.[31] Certainly this is not a material difference, sufficient to make one contract legal and the other *per se* illegal. It would be a simple matter for the shipper agreements in the instant case to be amended to provide a six-month price guarantee, were legality to depend upon it, but the result would be the elevation of form above substance.

2. The 1913 contracts were said by the Court of Appeals to provide space guarantees for all the shippers' cargo whereas it considered that the current contracts do not. This difference if it exists, is wholly immaterial to this case. The dual rate system is a defensive weapon permitted by the Board only where rate-cutting non-conference lines make serious inroads upon conference carryings, i.e., leaves conference lines with substantial unused space.[32] In such a situation, the last thing the shipper needs, or the carriers have to be contractually compelled to provide, is a space guarantee. In the present trade there are 300 sailings per year by vessels each of which has empty space. (R. 27). To make a feature as inconsequential as a space guar-

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[31] However, the Guinle & Co. contract quoted *supra*, p. 44, provided for an initial term of 3 months, following which the contract is terminable at the instance of either party on 30 days' notice. Thus, if the carriers wanted to raise rates, they could do so by the mere expedient of terminating the contracts and tendering new contracts at the higher rate.

[32] See Board decisions in *Japan-Atlantic and Gulf Freight Conference*, 4 F.M.B. — (1955); *North Atlantic Continental Freight Conference*, 4 F.M.B. — (1956); *Trans-Pacific Freight Conference of Japan*, 4 F.M.B. — (1956).

anty in an overtonnaged trade the touchstone of legality is to abandon realty.[33]

In short, the differences, such as they are, are illusory; in the material and operative features, the 1913 contracts and those of today are identical, both calling for a promise of exclusive patronage and for a discount rate in return for that promise.

C. The Alexander Committee Had Clear Notice That the Contract Rate System Would be Widely Used in Place of Deferred Rebates.

Various statements before the Alexander Committee made it absolutely clear to the Committee that if deferred rebates were outlawed the system of contract

[33] The dual rate contracts in the instant case provide that the Conference carriers "undertake to maintain a shipping service adequate to meet the reasonable requirements" of the trade and that if the Conference carriers cannot provide space, upon due notice, the shipper may book his cargo on a non-conference carrier (R. 204). In *Far East Conference* v. *United States*, 342 U.S. 570, 572 (1952), the Supreme Court's description of the dual rate agreement there in issue shows its similarity to the "requirements contracts" impliedly held lawful in the Judge Washington opinion: "The Conference members, however, were obligated to supply facilities sufficient to handle freight destined for the Far East." The contract in the *Far East* case provides no greater guarantee of space than the dual rate contract here in issue. The pertinent provision of the *Far East* contract is as follows:

> "If the carriers fail to furnish space after the Shipper duly applies therefor, the Shipper shall be free with respect to such shipment to secure space elsewhere without prejudice to his right to future shipments under this agreement provided the Shipper first notifies the office of the Far East Conference at New York and allows the Conference Secretary forty-eight hours from receipt of such notice to confirm that said space is not available." See Transcript of Record in the *Far East* case, p. 18.

rates would be extended to cover shipments in those trades.

The concern with shipping matters—particularly the practices of conferences—that gave rise to the Alexander Committee's investigation, was not local to the United States. In 1909, in Great Britain, the Royal Commission on Shipping Rings[34] brought to completion an investigation much like that of the Alexander Committee, and The Report of the Royal Commission was thoroughly studied by the American Committee,[35] which reprinted the parts of the Royal Commission Report here discussed.[36] One of the principal areas of inquiry of the Royal Commission was "whether shipping conferences can effectively exist without some tie upon the shipper either in the form of the system of deferred rebates, *or in some other form.*" 1 Alexander Report 378-379. In answering this inquiry, the Royal Commission commented on the contract rate system as follows (1 Alexander Report 380-381):

> "The only tie brought to our notice in the evidence which in our opinion would at the present day be effective both in binding the shippers and insuring all the advantages of the conference system in the degree in which they are now given is the deferred rebate. *In certain trades and with regard to certain commodites the support of shippers has been obtained by a system of contracts.*

[34] Conferences were commonly called shipping rings in Great Britain.

[35] 1 Alexander Report 267, 369, 711; 4 Alexander Report 4, 100.

[36] Part of the Royal Commission Report is embodied in the Alexander Report, Volume 1, pages 369-381. Citations to the Royal Commission Report are stated herein in terms of the pages of the Alexander Report at which they may be found.

The only advantage urged on behalf of this system, an advantage probably greater in theory than in practice, is that the contract is terminable at a certain date and the shipper is left free to make new arrangements without any such loss as is involved in the case of a rebate. On the other hand, it is open to certain objections. In the first place, to form an effective tie the contract must be for a long period. Secondly, as an alternative to the system of deferred rebates, the contract system does not appear to be uniformly applicable to all shippers in a large and general trade. In those trades in which it is used it is generally confined to one particular commodity, and in every case the shippers are comparatively few in number and well known. There is therefore no difficulty in finding them, and, when their support has been secured by contract, the shipowners have thereby obtained a guarantee of the bulk of the trade. In a large general trade, on the other hand, the shippers are many in number, and they vary from year to year and from month to month. A system of contracts therefore, in a trade of this character, would probably take the form of the *system which existed before the introduction of the rebate system. The shipowners, that is to say, would make contracts at low rates of freight with the large merchants who were known to them, and the small and casual shipper would have to pay a higher rate.* This is in fact the system which *now* [1909] exists in the export trade of the United States."[37]

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[37] By recommending the prohibition of contracts unfairly based on volume (enacted later in Section 14, Fourth), the Alexander Committee insured that the contract systems henceforth used would not have this objectionable feature.

The Royal Commission concluded that (1 Alexander Report 381):

> "Our opinion on the whole matter may be summarized as follows:
>
> "1. The advantages conferred by Shipping Conferences are substantially dependent upon the system of deferred rebates, or some system equally effective as a 'tie' upon the shippers and equally uniform in its application.
>
> "2. *If the rebate system were abolished, shipowners would endeavor to secure the custom of shippers by making contracts with them covering long periods.*
>
> "3. The contract system would in large general trades lead to the making of preferential contracts with large [shippers] at the expense of small shippers."

The Alexander Committee was aware of the Royal Commission's conclusion that a contract system would replace the deferred rebate system if the latter were outlawed, and it took pains to circumscribe its recommended prohibition of the deferred rebate in terms that did not preclude the contract rate system. It also took pains to insure that the contract system would be made available to *all* shippers by recommending that unfair volume requirements be outlawed (4 Alexander Report 421). The Committee must, therefore, have deemed lawful a contract system, such as "joint contracts made by the conference as a whole" where the carriers are "willing at all times to con-

tract with all shippers on the same terms" (4 Alexander Report 290).

This was not the only warning received by the Alexander Committee that deferred rebates, if outlawed, would be succeeded by a contract rate system. A "committee appointed by the representatives of steamship lines maintaining established services from New York to foreign countries"—the major carriers in the foreign trade of the United States at that time—reported to the Alexander Committee[38] that (2 Alexander Report 1369):

> "The alternative to the deferred-rebate system in trades where the return cargoes are insufficient to fill the ships required for the outward voyages is the long-term contract. *It is universally recognized that one or the other of these methods of insuring a continued patronage of the regular lines is necessary to justify the operation of such lines.*"

This, the Alexander Committee must have anticipated that a contract rate system would replace the deferred rebate system. Nowhere does the Committee indicate the intention to condemn this practice absolutely, although the lawmakers were familiar with it, and, moreover, knew that it probably would be widely used.

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[38] The Alexander Committee in its summary of Conference practices referred the readers to this report of the New York carriers (4 Alexander Report 295).

D. The "Retaliation" Condemned by the Act Relates to Retaliatory Denial of Service, and Not to Any System of Monetary Discount or Penalty, Such as the Contract Rate System.

From the foregoing, we believe that there can be no real doubt that the Alexander Committee was familiar with the contract rate system in a form identical in every material respect with that *sub judice*, and that moreover, it knew that the system would be even more widely used following the condemnation of the deferred rebate. Nonetheless, the Committee's recommendations were specific in their condemnation only of deferred rebates, and unfair volume contracts, and, what is more important, the Committee's references to these offensive practices were expressly hedged with the comment that the objectionable features thereof did *not* inhere in the contract rate system (4 Alexander Report 307).

In the light of this evidence to the contrary, it can scarcely be said that Section 14, Third, was designed to prohibit the dual rate system by way of its prohibition of retaliation. Such a result is at best improbable, when it is considered that such a reading of Section 14, Third, strips Section 14, First, of all effect, for the condemnation of the contract rate system as retaliatory would make wholly unnecessary the express and specific condemnation of the deferred rebate.

What, then, was Section 14, Third, designed to accomplish? The Alexander Report removes all uncertainty: the prohibition against retaliation which the Committee recommended and Congress enacted was aimed at the retaliatory *denial by a line or lines of service to a shipper* who had patronized a competitor, or has otherwise incurred the carrier's displeasure.

This is abundantly confirmed, time and again, by the language of the Committee.

When the Committee made its "Summary of Conferences and Agreements", 4 Alexander Report 288, it dealt with "retaliation" as follows:

> "Moreover, as has been repeatedly pointed out in this volume, shippers *require, above all else, a regular service*, and in this connection the testimony shows that by patronizing an outside line the shipper would not only *forfeit his rebates* but could be penalized *by being denied accommodations for future shipments even at the full rates of freight. Such retaliation* would leave the shipper unprotected since an independent line is not large enough to supply him with tonnage at all times."

It is obvious that the retaliation with which the Committee was concerned was (a) the forfeiture of accrued rebates, and (b) the blacklisting of shippers by denial of space for future shipments even at the full rate. The former evil could be, and was cured by the prohibition of deferred rebates; as defined in the statute, i.e., "a return of any portion of the freight money" which would be withheld if the shipper has violated his exclusive patronage agreement. Such a prohibition might nevertheless have left the carriers free to enforce exclusive patronage by denial of service. The Committee sought to prevent this by its condemnation of retaliation, thus furnishing a remedy for the evil described in the above quotation as deprivation of "*regular service*" (which "shippers require, above all else"), as "being denied *accommodations* for future shipments," and as "leav[ing] the shipper unprotected since an independent line is not large enough to supply him with *tonnage at all times.*"

This language is concerned with denials of *service*, of *vessel space*; on its face it has nothing to do with the imposition of a rate differential, or the payment of liquidated damages for a breach of the shipper's contract, which the Court below erroneously held to be retaliation. So far as contract systems based on *monetary* considerations were concerned, the Committee laid down the standards of legality with its recommendations against deferred rebates, unfair volume contracts, undue or unreasonable preferences or advantages, and unjust discriminations, recommendations translated by Congress into Sections 14, First, 14, Fourth, 16, and 17 respectively. *The Committee did not condemn, and never intended to condemn, contract systems enforced by monetary charges or discounts other than the narrowly defined deferred rebate system, or rate practices involving unfair volume contracts, or undue or unreasonable preference or advantage, or unjust discrimination. And by its condemnation of retaliation, the Committee and Congress meant to prohibit as unlawful per se the enforcement of faithful patronage by denial of service by the carrier, a feature absent from the dual rate system.*

Positive proof of this lies in the demonstrable fact that every substantial reference to the concept of "retaliation" by the Alexander Committee was coupled with the concept of denial of *service*, and never with imposition of a *monetary* disadvantage. For example (4 Alexander Report 313):

> "* * * it was frequently suggested that the lines should be compelled to accept cargo from all shippers when offered with due regard to the proper loading of the vessel and the tonnage available, *and should be prohibited from refusing accom-*

modations to any shipper by way of retaliation because he may have shipped by an independent line, or may have filed a complaint charging unfair treatment, or for other unjust reasons."

And, by way of introduction to its ultimate recommendations, the Committee stated: "A considerable number of complaints were also filed with the Committee objecting to * * * the unfairness of certain methods—such as fighting ships, deferred rebates, and *threats to refuse shipping accommodations*—used by some conference lines to meet the competition of non-conference lines." 4 Alexander Report 417. These were the methods condemned in Section 14, Second, First, and Third, respectively.

The Committee's concern with retaliation by denial of space stemmed from several instances of complaints about this practice, such as the case of a coffee importer who was denied space because he had "incurred the displeasure of the conference lines." 4 Alexander Report 166-168. Other similar examples of retaliation by denial of service were described by the Committee. 1 Alexander Report 18, 36.

Alternative forms of retaliation were brought to the Committee's specific attention: retaliation by the denial of space in trades between foreign countries, such as the case of a shipper who had used an independent line to carry his shipments from Brazil to the United States and was then refused service by conference vessels for his shipments from Brazil to Europe (1 Alexander Report 33, 45; 4 Alexander Report 164); and retaliation by denial of necessary lighterage service, where lighterage facilities were controlled by a conference line, because the shipper had

patronized a non-conference line. 1 Alexander Report 125.

The catchall clause "other discriminating or unfair methods," in Section 14, Third, clearly relates to these alternative methods of retaliation. The Committee aimed to prevent retaliation, not only by denial of service in the trade immediately involved, but by such "other discriminating or unfair methods" as denial of necessary accessorial services or denial of space in other trades.[39]

The ultimate recommendation of the Committee was that "all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting to *other unfair methods* of discrimination * * *." 4 Alexander Report 421. Obviously, the Committee was concerned about retaliation accomplished by *unfair* discriminations, serving to exclude shippers from full service.

The statute, as ultimately enacted, slightly transposes the wording employed by the Committee and employs the phrase "other discriminating and unfair methods." Upon this slender thread—the omission of the routine word "unjustly" or "unfairly" in front of the word "discriminatory"—depends the reason-

[39] Although Section 14, Third, is directed solely to the absolute prohibition of retaliatory denials of service, the Alexander Committee did not neglect to afford remedies for offensive carrier *rate* practices as well. Under Section 14, First, it condemned deferred rebates as unlawful *per se;* under Section 14, Fourth, it condemned unfair volume discounts; under Section 16, it condemned undue or unreasonable preferences or advantages; and under Section 17, it condemned unjust discriminations. The dual rate system, although not involving denial of service and hence not retaliatory under Section 14, Third, still must pass muster under these other sections.

ing of the Court below—central to its decision—that Congress in Section 14, Third, meant to condemn *any* discrimination, whether just or unjust, fair or unfair, substantial or unsubstantial. This reasoning, even assuming, arguendo, that dual rates are retaliatory within the meaning of Section 14, Third, is inconsistent with that of other courts which have held that in a regulatory statute, the bare term "discrimination" must be read to mean "*unjust* discrimination." As stated in *United States* v. *Wells Fargo Express Co.*, 161 F. 606, 610 (C.C., N.D. Ill., 1908), "It is difficult to conceive of the terms 'discrimination,' 'prejudice,' or 'disadvantage' as not associated with what is unjust, unreasonable, and undue."[40] And in *Platt* v. *LeCocq*, 150 F. 391, 397 (C.C., S.D. 1906), it was similarly held that the unmodified words "prejudice and disadvantage" used in a South Dakota transportation statute must be read to mean "*unreasonable* prejudice or disadvantage." See also *United States* v. *Koenig Coal Co.*, 270 U.S. 512, 518-519 (1926):

> "The words advantage, concession and discrimination in the statute [Elkins Act, § 1, 32 Stat. 847, 49 U.S.C. 41(1)] must be construed to mean unlawful concession, unlawful advantage, unlawful discrimination. It certainly was not the intention of Congress to punish the granting or receiving of a lawful concession, a lawful advantage or a lawful discrimination."

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[40] Although the case did not turn on this point, the United States argued, on appeal, in *American Express Co.* v. *United States*, 212 U.S. 522 (1909), that the lower court's concept that the unmodified term "discrimination" means "unjust discrimination" should be overruled. The Supreme Court, however, did not see fit to modify the lower court's decision.

The legislative history is wholly silent on the reasons, if any, for this particular phrasing which ultimately appeared in Section 14, Third; but even assuming that Section 14, Third, relates to rate discriminations, there is no evidence in the floor debates or Committee documents of any intention to embody in that section an absolute prohibition against *all* discrimination, rather than only *unjust* discrimination. On the contrary, what evidence there is clearly points in the other direction. The language of Section 14, Third, as enacted is identical with that recommended in the final report of the House Merchant Marine Committee on H.R. 14555, which bill ultimately became the Shipping Act, 1916. Report No. 659, 64th Cong., 1st Session. *This Report explains the provisions of what became Section 14, Third, by quoting verbatim the recommendation of the Alexander Committee* as to retaliation, containing the phrase "by resorting to other unfair methods of discrimination." Report No. 659, 64th Congress, 1st Session, p. 30. Since the language of the bill was explained in the language of the Alexander Report recommendation, it is apparent that it must be interpreted in the same sense as that recommendation.

The interpretation of the Court below not only is inconsistent with this history, but also runs counter to the conventional regulatory pattern, in which discriminations are invariably condemned only when *unjust*, or *undue*. In placing cardinal importance upon the omission of the routine word "unjustly," the Court gives to Section 14, Third, a meaning which would have a profoundly unsettling effect upon a large segment of our commerce, and one which wholly ignores the legislative intent expressed in the recommendation

of the Alexander Committee that "all carriers should be prohibited from retaliating against any shipper by refusing space accommodations when such are available, or by resorting to *other unfair methods* of discrimination * * *" (4 Alexander Report 421)—i.e., such unfair methods as involve denial of vessel space, or of necessary accessorial services, or of service in other trades.

IV.

COURT AND AGENCY DECISIONS HOLD THAT THE SYSTEM IS NOT ILLEGAL PER SE

The Court of Appeals decision overturns practices followed for decades in many of our major foreign trade routes. The Board and its predecessors have long believed that they have power to approve the dual rate system, and acting for many years upon that belief, it has approved the use of the system where justification therefor was established. The contention that the system is illegal *per se* has frequently been addressed to the Courts, but in every case has been rejected. The Court below explicitly recognized that its decision was unprecedented: it said that "the dual rate system has not been held by any judicial decision to be invalid under Section 14, Third; that is, without regard to the reasonableness or justness of the discrimination inherent in the system." (R. 244) We believe that a fair reading of the authoritative decisions will establish that the dual rate system is *not* unlawful *per se*, and that the decision below is in direct conflict with decisions of this Court involving the same issue.

A. The Decisions of the Courts.

In *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U.S. 474 (1932), this Court reviewed a District Court order dismissing a complaint that a dual rate system constituted a violation of the Sherman and Clayton Acts. The complainant argued that the dual rate system could not legally be approved by the Board. After a thorough analysis of the 1916 Act and its background, the Supreme Court explicitly held that jurisdiction over the matter was in the Board. The decision of the Court of Appeals in the case at bar is in direct conflict with this Court's decision in the *Cunard* case.

It was urged to the Court that its ruling in *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291 (1922), was controlling in *Cunard*. In the *Great Northern* case, the Supreme Court had held that where the question at issue "concerned merely the legal construction of an interstate tariff, no question of fact, either as an aid to the construction, or in any other respect, and no question of administrative discretion, being involved * * * the issue was within the primary jurisdiction of the courts without preliminary resort to the commission." 284 U.S. at pp. 481-2. Such is still the law. *United States* v. *Western Pac. R. Co.*, 352 U.S. 59, 69 (1956). The Court in *Cunard* rejected the argument that the dual rate system was, as a pure matter of law, illegal under Sections 14 and 17 of the Shipping Act. Instead, the Court held the issues would or might turn upon shipping economics and that primary exclusive jurisdiction therefore lay in the Shipping Board. It stated (pp. 485, 487):

> "Whether a given agreement among such carriers should be held to contravene the act may depend

upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal.

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"Moreover, having regard to the peculiar nature of ocean traffic, it is not impossible that, although an agreement be apparently bad on its face, it properly might, upon a full consideration of all the attending circumstances, be approved or allowed to stand with modifications."

Thereafter, in *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297 (1937), this Court sustained the Board's predecessor's prohibition of the use of dual rates in the domestic intercoastal trades. Although the three-judge District Court, which had also sustained the Secretary's order, *had ruled in effect that the system was illegal per se*,[41] *the Supreme Court took pains to overrule this holding*, pointing out that:

"Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic. [Citations omitted.]

"*In determining whether the present discrimination was undue or unreasonable the Secretary*

[41] *Swayne & Hoyt, Ltd.* v. *United States*, 18 F. Supp. 25, 27-28 (D.C., D.C. 1936).

was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter." (p. 304)

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"Even though, as appellants seem to argue, the evidence may lend itself to support a different inference, we are without authority to substitute our judgment for that of the Secretary that the discrimination was unreasonable." (p. 307)

The Court further stated (p. 307, footnote 3) that the Alexander Committee was fully informed of the contract-rate system and expressly recognized the propriety of its use while condemning other systems. The Court therefore acknowledged that the dual rate system may be justified by the circumstances:

"The Report of the House Committee on the Merchant Marine & Fisheries, H.R. Doc. 805, 63d Cong., 2d Sess. (1914), recommended (p. 307) the prohibition of deferred rebates, adopted in § 14 of the Shipping Act, because it operated to tie shippers to a group of lines for successive periods, and because the system 'is unnecessary to secure excellence and regularity of service, a considerable number of conferences being operated today without this feature.' See, e.g., pp. 103-105, 200. The Committee recognized that the exclusive contract system does not necessarily tie up the shipper as completely as 'deferred rebates,' since it does not place him in 'continual dependence' on the carrier by forcing his exclusive patronage for one contract period under threats of forfeit of differentials accumulated during a

previous contract period. *Accordingly, the Committee did not condemn the contract system completely.* Cf. *W. T. Rawleigh Co.* v. *Stoomvaart*, 1 U.S.S.B. 285. The policy of the statute may properly be applied where, as in the circumstances in this case, the contract system must be taken as actually operating to effect a monopoly. Cf. *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 U.S. S.B. 41".

In *Far East Conference* v. *United States*, 342 U.S. 570 (1952), this Court reviewed the denial by the District Court, in 94 F. Supp. 900 (D.C. N.J. 1951), of defendant's motion to dismiss a suit brought by the Government to enjoin alleged violations of the Sherman Act by the Conference through use of a dual rate system. The parties argued vigorously the question whether Section 14, Third, rendered the dual rate system illegal *per se*.[42] In its brief to this Court the Board requested that the Court not remand the case to the agency for administrative adjudication if Section 14, Third, rendered the Board without power to approve the dual rate system there involved.[43] In the

[42] The Section 14, Third, issue was argued in the following briefs in the *Far East* case:

1. Brief for the United States, pp. 22-23.
2. Brief of petitioners other than Isthmian Steamship Company, pp. 61-87.
3. Brief for Federal Maritime Board, pp. 40-42.

[43] The Board's brief in the *Far East* case states (pp. 41-42):

"We agree with Judge Frank's statement in *Civil Aeronautics Board* v. *Modern Air Transport* (2d Cir.) 179 F. 2d 622, 625, that to refer a matter to an agency for possible approval of what the law forbids, would be merely a 'delaying formalism' that would serve none of the purposes which the doctrine of primary administrative jurisdiction is intended

dissenting opinion, Justices Douglas and Black stated that it was not necessary that the case be first heard by the Board under the Shipping Act. The minority decision rested upon the ground, among others, that the dual rate system is illegal *per se* and may not be administratively approved. The majority of the Supreme Court, however, did not hold the system *illegal per se* and, following the doctrine of the *Cunard* case, ordered dismissal on the ground that the Board had primary jurisdiction of the matter in order to pass upon just those issues which the court below has here ruled to be irrelevant. The Court held in the *Far East Conference* case (p. 574):

> "The Court thus applied a principle, now firmly established, that in cases *raising issues of fact* not within the conventional experience of judges or cases *requiring the exercise of administrative discretion*, agencies created by Congress for regulating the subject matter should not be passed

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to promote—one of such purposes being to let the courts "make a workable allocation of business between themselves and the agencies.' (179 F. 2d at 625).

"Our insistence that the subject of the present suit be referred to the Board before adjudication in court is in no sense based upon the expedient of 'delaying formalism,' but upon the necessity of protecting the Board's primary jurisdiction as conferred by Congress, to regulate the activities of steamship conferences through the device, among others, of granting or denying them immunity from the normal rules of competitive behavior. *Assertion of the Board's primary jurisdiction necessarily rests on the proposition that the Board has power to authorize what the Court is here asked to prohibit.*

"The Board's power to approve the dual-rate system stems from section 15 of the Shipping Act and involves the question whether the power conferred by Section 15 is circumscribed by restrictions set forth in Section 14, paragraph Third, of the same statute."

> over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined."

In *Isbrandtsen Co., Inc.* v. *United States*, 81 F. Supp. 544 (S.D.N.Y. 1948), appeal dismissed without opinion *sub. nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.*, 336 U.S. 941 (1949), Isbrandtsen sought to restrain the Eastbound and Westbound North Atlantic conferences from instituting a contract-rate system and to set aside orders of the Board's predecessor approving that portion of the conference agreement providing for institution of a contract-rate system. The injunction was granted, conditioned on Isbrandtsen's diligent prosecution before the Board's predecessor of a complaint challenging the validity of the agreements.

The District Court's comment on the question of whether the system is illegal *per se* is significant:

> "It may be that the 'exclusive patronage' provisions are prohibited by 46 U.S.C.A. § 812 [section 14, Shipping Act] and that the Commission is powerless to approve such provisions under 46 U.S.C.A. § 814. *Very considerable doubt upon such a holding is thrown by Swayne & Hoyt Ltd.* v. *U. S.*, 1937, 300 U.S. 297, 306, 307 and note 3, 57 S. Ct. 478, 81 L. Ed. 659, *and by the legislative history of the statute* H.R. Doc. No. 805, 63d Cong., 2d Sess., 1914, 287-292." 81 F. Supp. at 546."[44]

[44] Following this decision, Isbrandtsen prosecuted its complaint before the Board's predecessor, and the proceedings culminated in a Board order approving the proposed dual rate system and dismissing Isbrandtsen's complaint. That order was the subject of a suit for review in the United States Court of Appeals, District of

The subsequent Court decisions on the subject of dual rates have held that the differential or "spread" between contract and non-contract rates must not be arbitrarily fixed, *Isbrandtsen Co., Inc.* v. *United States,* 96 F. Supp. 883 (S.D. N.Y. 1951), affd. without opinion by an equally divided Supreme Court *sub. nom. A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co.,* 342 U.S. 950 (1952); and that the institution of a dual rate system amounted to a new or modified agreement between the carriers, requiring prior Board approval under Section 15 as a condition to legality, *Isbrandtsen* v. *United States,* 93 App. D.C. 293, 211 F. 2d 51 (D.C. Cir. 1954), cert. den. 347 U.S. 990; *River Plate and Brazil Conferences, et al* v. *Pressed Steel Car Co.,* 124 F. Supp. 88 (S.D.N.Y., 1954).

Throughout the period covered by these decisions, the dual rate system was in extensive use. It seems plain that if the system were illegal *per se,* as has been urged in each of the above cases, the outcome would long since have been outright condemnation of the system. Rather, the governing judicial pronouncements are those in the *Swayne & Hoyt, Cunard, and Far East* cases, *supra,* which held that it was for the agency to decide whether the system is reasonable or unreasonable in each particular case.

B. The Decisions of the Board.

Neither of the opinions of the Court below so much as mentions the long course of decisions by the Board in this basic area of its specialized responsibilities. We do not urge that the Board's interpretation of Sec-

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Columbia Circuit, styled *Ezra Taft Benson* v. *United States,* No. 13316, in which proceedings are being held in abeyance pending the outcome of this case.

tion 14, Third, is controlling upon the courts. We do urge, most emphatically, that a court should not revolutionize a shipping practice of long standing without the most careful attention to the interpretation developed over many years by the Shipping Board, the Secretary of Commerce, the Maritime Commission and the Federal Maritime Board.

This Court has very frequently accepted as controlling, so long as it had a rational and sensible basis, the administrative interpretation of the governing statute which the agency is called upon to interpret and apply. Examples are: *Shields* v. *Utah Idaho R. Co.*, 305 U.S. 177, 182 ("interurban electric railway"); *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 146 (corporation "controlled by" another); *Gray* v. *Powell*, 314 U.S. 402, 411 ("producer" of coal); *NLRB* v. *Hearst Publications*, 322 U.S. 111, 131 ("employees"); *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504, 507-508 ("course of employment").[45] Such a respect for the administrative interpretation is singularly appropriate here: the agency has been administering the statute for 41 years; its decisions have been woven into the fabric of a major industry; and ocean shipping is an activity many of whose characteristics are unique and uncommonly complex.

The Board in its decision here has supplied a careful chronological narration of the course of its own decisions and of the related court decisions in the dual rate system (R. 38-48). This we shall not duplicate, but shall show instead (a) the consistent Board rule

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[45] A contrary approach seems to have been followed in *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144; *Otis & Co.* v. *SEC*, 323 U.S. 624; and *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 677-678.

that the system is not *per se* illegal, and (b) the developing precision of the standards which it has applied to determine whether the particular system is unduly discriminatory.

The earliest decisions were in two cases brought by shippers who sought to establish that Section 14, Third, made the dual rate system unlawful *per se*. The Shipping Board rejected the argument. *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41, 46 (1922); *Rawleigh* v. *Stoomvaart et al.*, 1 U.S. S.B. 285 (1933). This issue was thereafter left at rest until the post-war litigation of respondents Isbrandtsen and the Departments of Justice and Agriculture. The Board has consistently held (in each of the cases discussed below) that Section 14, Third, is inapplicable and that the validity of each dual rate system must be determined on its own facts under Sections 15, 16 and 17 of the Act.

The standards which the Board has developed for approval have become quite precise. They are, moreover, by no means likely to encourage any unwarranted use of the dual rate sytsem.

The dual rate system will not be approved when inaugurated by a single line, which seeks to exclude all other carriers. *Eden Mining Co.* v. *Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41 (1922).[46] It will not be approved in the intercoastal trade after 1933, when the Intercoastal Shipping Act gave the Board power to control minimum and maximum rates; the decisions

[46] This case contains some broad language about the generally discriminatory nature of the dual rate system (pp. 45-46) but has by subsequent decisions been confined to its single-carrier facts (*Rawleigh* case, *supra*, p. 290; *Isbrandtsen Co.* v. *North Atlantic Freight Conf.*, 3 F.M.B. 235, 241 (1950)), and in any case expressly rejected the argument of invalidity *per se* under Section 14, Third (p. 46).

carefully except foreign commerce. *Intercoastal Investigation*, 1 *U.S.S.B.B.* 400, 452, 454, 456, 467 (1935); *Gulf Intercoastal Contract Rates*, 1 U.S.S.B.B. 524; 529-530 (1936). The system will not be approved unless conference membership is open to any carrier in the trade, *Phelps Bros. & Co.* v. *Cosulich Societa, Etc.*, 1 U.S.M.C. 634, 640-641 (1937), upon payment of a reasonable fee, *Pacific Coast European Conference*, 3 U.S.M.C. 11, 14 (1948). It will not be approved when it is used to forbid shippers to use a loading range not served by the conference. *Contract Routing Restrictions*, 2 U.S.M.C. 220, 226 (1939). Nor will the Board allow liquidated damages which are retroactive or too heavy. *Pacific Coast European Conference*, 3 U.S.M.C. 11, 19 (1948); cf. *Isbrandtson Co.* v. *N. Atlantic Frt. Conf. et al.*, 3 F.M.B. 235, 246 (1950). Finally, the dual rate system will not be approved unless there is a showing that its use will not result in a virtual monopoly by the conference lines, nor if the Board concludes that the dual rate system will not in itself eliminate the rate instability due basically to over-tonnaging and malpractices such as secret rebates by member lines. *Trans-Pacific Freight Conference of Japan*, 4 F.M.B. — (1955).

A dual rate system which is subject to none of these defects will, on the other hand, be approved when the Board finds that its advantages are sufficient to outweigh the *prima facie* discrimination inherent in such a system. A variety of factors have received emphasis. No monopoly by a single or a few lines would be involved. *Rawleigh* v. *Stoomvaart et al.*, 1 U.S.S.B. 285 (1933); *Secretary of Agriculture* v. *N. Atlantic Continental Freight Conf.*, 4 F.M.B. — (1956). A convincing showing has been made that the dual rate

system is necessary to avoid rate-wars, to permit forward-trading by shippers, and to assure rate stability and regularity of service. *Rawleigh* v. *Stoomvaart, supra; Pacific Coast European Conference*, 3 U.S.M.C. 11, 17 (1948); *Isbrandtson* v. *N. Atlantic Frt. Conf. et al.*, 3 F.M.B. 235, 244-245; *Secretary of Agriculture* v. *N. Atlantic Continental Freight Conf.*, 4 F.M.B. — (1956). The support of shippers interested in the trade has been given weight. *Pacific Coast European Conference*, 3 U.S.M.C. 11, 17 (1948); *Isbrandtsen Co.* v. *N. Atlantic Frt. Conf. et al.*, 3 F.M.B. 235, 245 (1950); *Secretary of Agriculture* v. *N. Atlantic Continental Freight Conf.*, 4 F.M.B. — (1956). Commodities which are not carried by non-conference competitors cannot be included. Instant case, R. 63. The rate differential must not be so great as to prevent use of the non-conference lines. *Contract Rates—North Atlantic Continental Freight Conf.*, 4 F.M.B. 355 (1954); instant case, R. 62.

This record shows that the Board is exercising a close and discriminating judgment in the discharge of its responsibilities. It shows, moreover, that from the beginning it has been the settled rule of the Board that dual rate systems were not invalid under Section 14, Third, of the Shipping Act, 1916. The novel construction of the Court below would overthrow both this settled rule and the careful standards developed over the years by the Board in order to protect alike the shippers, the conference carriers, and their non-conference competitors.

CONCLUSION

The decision below, we submit, is clearly erroneous. It misinterprets the literal wording of Section 14 Third, of the Act, and gives that provision a meaning inconsistent with its legislative history and out of harmony with the rest of the Act. For it is clear that Section 14, Third, was aimed at the enforcement of patronage under sanction of denial of service, and not under the inducement of a monetary discount or penalty. Inducements or penalties of a monetary nature are dealt with in Sections 14, First, and 14, Fourth, where the statute condemns, respectively, deferred rebates and unfair volume discounts, and in Sections 16 and 17, by which the Board is given the responsibility of protecting shippers against undue or unreasonable preferences or advantages, and unjust discriminations, respectively. It is further clear that the Alexander Committee which expressly condemned some practices but not the contract rate system, knew of the then use of contract systems not materially different from the one *sub judice*, and further knew that their use would become even more widespread following prohibition of the deferred rebate system. Moreover, the Court of Appeals' decision gives to Section 14, Third, a breadth of meaning that writes Section 14, First, out of the Act, and may serve to impose substantial criminal liability upon carriers who have used the system for decades.

The decision below, furthermore, puts ocean common carriers in a position untenable in the face of rate cutting competition, and it would operate, unless reversed, to permit those evils of unrestrained competition apprehended by the Alexander Committee, and found by the Board in the instant case to be inevitable

in this trade unless stability can be restored by use of the dual rate system.

Finally, the decision below is in direct conflict with a generation of precedent and authority, including recent decisions of this Court.

The order of the Court of Appeals should be reversed.

Respectfully submitted.

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Date: September 13, 1957

APPENDIX A

Statutes Involved

A. Selected provisions of the Shipping Act, 1916 (extracted from Title 46, U.S.C.A.)

Sec. 14. (46 U.S.C. sec. 812.) No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. The term "deferred rebate" in this chapter [Act] means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the shipper has complied with the terms of the rebate agreement or arrangement.

Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term "fighting ship" in this chapter [Act] means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense.

* * * * *

SEC. 15. (46 U.S.C. sec. 814.) Every common carrier by water or other person subject to this chapter [Act], shall file immediately with the commission [board] a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter [Act], or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The commission [board] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory

or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors or to operate to the detriment of the commerce of the United States, or to be in violation of this chapter [Act], and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the commission [board] shall be lawful until disapproved by the commission [board]. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the commission [board].

All agreements, modifications, or cancellations made after the oragnization of the commission [board] shall be lawful only when and as long as approved by the commission [board], and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Every agreement, modification, or cancellation lawful under this section shall be excepted from the provisions of sections 1-11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action.

Sec. 16. (46 U.S.C. Sec. 815)

It shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever, or to subject any particular person, locality, or

description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this Act.

Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense.

Sec. 17. (46 U.S.C. 816.) No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

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